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In The

Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, OREGON NATURAL RESOURCES COUNCIL, OREGON WILDLIFE FEDERATION, PACIFIC RIVERS COUNCIL, PORTLAND AUDUBON SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, NATIONAL TROUT UNLIMITED, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioners,

v.

MICHAEL P. DOMBECK, in his official capacity as Chief of the United States Forest Service, GRANT COUNTY, ROBERT BURRIL, and EASTERN OREGON PUBLIC LANDS COALITION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT GRANT COUNTY'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does Section 401(a) of the Clean Water Act ("CWA") apply to permits and other licenses issued by federal agencies for activities which may result in nonpoint source pollution.

CORPORATE DISCLOSURE STATEMENT

Grant County, a municipal corporation and political subdivision of the State of Oregon, has no parent company or subsidiaries. -

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 172 F.3d 1092 (9th Cir. 1999). The opinion of the district court (Pet. App. 20-35) is reported at 940 F. Supp. 1354 (D. Or. 1996).

JURISDICTION

The judgment of the court of appeals was filed on May 3, 1999. A petition for rehearing and petition for rehearing en banc was denied on April 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the CWA states:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title . . . No license or permit shall be granted until the certification required by this section has been

obtained or has been waived as provided in the preceding sentence.

33 U.S.C. § 1341(a) (Pet. App. 39)

Section 313(a) of the CWA states:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a).

Section 319(a)(1) of the CWA states:

The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which . . . (B) identifies those categories and subcategories of nonpoint sources or, where appropriate particular nonpoint sources which add significant pollution to each portion of the navigable waters . . . in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation for identifying best management practices and measures to control each category and subcategory

> of nonpoint sources and, where appropriate particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or sources . . .

33 U.S.C. § 1329(a)(1).

Section 319(b) of the CWA states:

> The Governor of each State . . . shall . . . prepare and submit to the Administrator for approval a management program which such State proposes to implement . . . for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

33 U.S.C. § 1329(b)(1).

STATEMENT OF THE CASE

Petitioner challenged the decision of the United States Forest Service to issue Robert and Diana Burril a federal permit to graze 50 head of cattle on the Camp Creek grazing allotment within the Malheur National Forest (Pet. App. 4). Since the cattle wade in the streams and have the potential to introduce waste and sediment into the streams, the Petitioner contended that this activity could only be permitted by the federal government if the state first certified that the permitted activity would comply with the State of Oregon's water pollution control programs.

In issuing the grazing permit the Forest Service did not require certification under § 401 – a practice consistent with its interpretation that the term "discharge" was limited to point sources and therefore certification was not required for federal grazing permits which did not constitute point sources. (Pet. App. 31).[1] While certification was not required, consistent with the federal facilities and property provisions of § 313 (33 U.S.C. § 1323) and the State of Oregon's nonpoint source management program adopted under § 319 of the CWA (33 U.S.C. 1329) (ER 12-32), the Forest Service addressed grazing-caused runoff and other forms of nonpoint source pollution by incorporating into the grazing permit specific measures to control any pollution that may occur (ER 1-9).[2]

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[1] Since its inception in the Water Quality Improvement Act of 1970, the certification provisions have not been applied to grazing permits on federal lands. Pet. App. 31. For over 25 years neither the Forest Service nor the State of Oregon interpreted § 401 as applying to those activities that generate pollution solely from nonpoint sources (ER 10 & ER 11).

[2] Although petitioners refer ominously to the pervasive nature of nonpoint sources of pollution, they fail to disclose that under § 319 (33 U.S.C. 1329) and § 208 (33 U.S.C. 1288) the CWA has left to the states the manner in which to address these pollution sources. The State of Oregon has adopted a nonpoint source pollution management program pursuant to § 319(b)(1) and all federal agencies are required by § 313 to implement the plan (ER 54-67). The State of Oregon's nonpoint source management program was approved by the Environmental Protection Agency pursuant to § 313(d) notwithstanding that the program did not incorporate a certification for activities that might produce pollution from nonpoint sources (ER 33-34).

The district court enjoined the Forest Service holding that any activity which might result in water pollution must be preceded by a state certification under § 401. (Pet. App. 34). The court of appeals reversed, holding that certification under CWA § 401 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources. (Pet. App. 16).

ARGUMENT

Contrary to the petitioners' contentions (Pet. 5-6), the Ninth Circuit's decision is correct and does not conflict with other decisions in this Court or other circuits. Further review is therefore unwarranted.

I. THE CONTEXT AND HISTORY OF THE CLEAN WATER ACT DEMONSTRATES THAT PERMITS FOR ACTIVITIES THAT PRODUCE POLLUTION SOLELY FROM NONPOINT SOURCES ARE NOT COVERED BY THE CERTIFICATION PROVISIONS OF § 401.

As the Ninth Circuit correctly observed, the context of the CWA does not support the conclusion that § 401 applies to nonpoint sources of pollution. (Pet. App. 9). By selectively focusing on one section of the Water Quality Improvement Act of 1970 (Pub. L. No. 91-224, 84 Stat. 91 (1970)), the petitioners ignore both the history and context of the CWA.

To support their argument the petitioners contend that the certification provisions adopted in the Water Quality Improvement Act of 1970 were intended to cover

both point sources and nonpoint sources of pollution,[3] a contention that is simply wrong for it ignores that the context of the Water Quality Improvement Act of 1970 focused on technology driven controls on industrial and municipal discharges and did not regulate nonpoint sources. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). It was not until the 1987 amendments that a program to regulate nonpoint sources was adopted. *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316-18 (9th Cir. 1990) (The CWA banned only discharges from point sources and runoff from nonpoint sources was not directly prohibited); *Oregon Natural Res. Council v. U.S. Forest Service*, 834 F.2d 842, 849 fn. 12 (9th Cir. 1987) (nonpoint sources are not regulated by the CWA but are to be addressed through grants and assistance to states who develop management programs).

The context of the certification program at the time it was adopted in the 1970 amendments, demonstrates that Congress did not view the certification requirements as covering all polluting activities. Congress intended certification to apply when the various federal agencies

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[3] The term "point source" means "any discernable confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Nonpoint source pollution is not specifically defined in the CWA but represents the pollution that does not result from the discharge of pollutants through a point source and generally consists of runoff and siltation. *Oregon Natural Res. Council v. U.S. Forest Service*, 834 F.2d at 849 fn. 9; *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984).

issued permits for thermal discharges and dredge spoils.[4] Subsequently, with the adoption of the 1972 amendments, certification was also applicable to Environmental Protection Agency ("EPA") issued National Pollutant Discharge Elimination System permits[5] ("NPDES").[6] *E.P.A. v. Cal. State Water Resources Control Bd.*, 426 U.S. 200, 219, 96 S.Ct. 2022, 2031, 48 L.Ed.2d 578, 591 (1976). *Arkansas v. Oklahoma*, 503 U.S. 89, 112 S.Ct. 1046, 1054-55, 117 L.Ed.2d 239 (1992).

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[4] The Congressional debates demonstrate that the certification provisions were enacted in response to concern over two types of discharge: discharge of heated water from power plants and dumping of spoil material from dredging operations. *See* 115 Cong. Rec. 28,958 (1969); 115 Cong. Rec. 9050 (1969); 116 Cong. Rec. 9332 (1970). Consistent with this legislative intent, the State of Oregon interpreted its certification program to apply to Federal Energy Regulatory Commission hydropower licenses and to § 404 dredge and fill permits (ER 11).

[5] Under § 402 (33 U.S.C. § 1342), either the state or EPA may issue NPDES permits allowing the discharge of a pollutant notwithstanding the prohibitions against discharge of pollutants set forth in § 301 of the CWA (33 U.S.C. § 1311).

[6] Petitioners contend that since point sources are regulated by the states through the NPDES program then it would be superfluous for the certification program to be limited to point sources which the State of Oregon is already regulating under the NPDES permitting program (Pet. 11). Petitioners have overlooked that not all states have – or had at the time of the 1972 amendments – a NPDES permitting program. In those situations where the state does not issue NPDES permits then it is the EPA that issues the permits. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 1789, 68 L.Ed.2d 114 (1981); *Arkansas v. Oklahoma*, 503 U.S. 89, 112 S.Ct. 1046, 1055, 117 L.Ed.2d 239 (1992). Any EPA issued permit is subject to state certification under § 401.

The petitioners' narrow focus on the 1970 Water Quality Improvement Act is misguided in that it ignores that the 1972 amendments represented a major overhaul of the water quality program. Congress viewed the previous legislation to be "inadequate in every vital aspect" and intended to "do something quite different with the 1972 Amendments." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 1793, 68 L.Ed.2d 114 (1981). The 1972 amendments were a "complete rewrite" and "total restructuring" of the federal water pollution law. *Arkansas v. Oklahoma*, 503 U.S. 89, 112 S.Ct. 1046, 1054, 117 L.Ed.2d 239 (1992); *City of Milwaukee v. Illinois and Michigan*, at 1793. The Ninth Circuit correctly noted that the 1972 amendments were to "assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." (Pet. App. 12).

Petitioners simply ignore that it was not until the 1987 amendments (Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 1987) that nonpoint sources were subject to regulation under the CWA. Prior to that date only point sources were regulated. It was within this historical context that the certification provision was adopted.

That certification only applied to point sources is also evidenced by the Congress' interpretation of the term "permits." As used in the CWA the term "permit" applies only to those activities that involve the discharge of pollutants and does not cover those activities associated with nonpoint sources. The Conference Report accompanying the 1972 amendments provided that:

> It is the conferee's intent that a permit means any permit or equivalent document or requirement issued to regulate the *discharge of pollutants.*

Joint Explanatory Statement of the Committee of Conference, Conf. Rep. No. 92-1236 92 Cong. 2d Sess. (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News, 3776, 3822 (emphasis added). The phrase "discharge of pollutants" referenced in the conference committee report is defined as:

> " . . . any addition of any pollutant to navigable waters from any *point source.*"

33 U.S.C. 1362(12) (emphasis added). Congress' statement that permits only applied to documents regulating point sources is consistent with the context of the CWA to focus on discharges from point sources.

Contrary to the petitioners' allegations, nonpoint sources of pollution are not, and have not been, subject to the certification provisions of § 401. The Ninth Circuit's opinion recognized the bright line distinction that Congress intended in the regulation and management between point sources and nonpoint sources of pollution.[7]

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[7] The petitioners simply ignore that nonpoint sources of pollution occurring as a result of permitted activities on federal lands are regulated through other sections of the CWA. Pursuant to § 313 (33 U.S.C. § 1323) wherein all federal agencies are to insure compliance with the applicable water quality programs of the states including the State of Oregon's nonpoint source management plans (ER 12-32) adopted pursuant to § 319. (33 U.S.C § 1329(m)). In fulfilling this mandate the Forest

II. THE TERM DISCHARGE IS LIMITED TO POINT SOURCES.

Petitioners contend that the term "discharge" is an expansive term which was designed to cover all sources of water pollution (Pet. 12).[8] The Ninth Circuit determined that Congress intended that the term be applied only to those discharges that arise from point sources and it did not include pollution arising from nonpoint sources (Pet. App. 12-13).

The legislative history reveals that the term "discharge" was incorporated in the 1972 rewrite to indicate the scope of the control requirements under the CWA – a scope that was limited to the addition of pollutants from a point source. S. Rep. No. 92-414, 92 Cong. 2d Sess. (1971) *reprinted in* 1972 U.S. Code Cong. Ad. News, 3668, 3743. The Ninth Circuit properly recognized that term "discharges" did not include nonpoint sources of pollution. (Pet. App. 12-13). The legal theory upon which the Ninth Circuit based its decision has been extant since

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Service entered into a number of agreements with the State of Oregon wherein it agreed to specific management measures it would undertake to address nonpoint sources of pollution. (*See* ER 35-92). These management measures were incorporated into the grazing permit issued to Mr. and Mrs. Burril (ER 1-9).

[8] The pervasive reach of this expansive interpretation was illustrated by the Ninth Circuit panel's question posed during oral argument wherein petitioners admitted that certification of nonpoint sources of pollution would extend to such innocuous activities as youth camps and children swimming in lakes and streams when these activities occurred on the national forests. This broad interpretation would do little to improve water quality yet would add significant burdens to the permittee, as well as the state and federal agencies.

1987 when the Ninth Circuit issued its decision in *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1982) that nonpoint sources of pollution are not discharges. (*Id.* at 849).

That Congress did not consider nonpoint pollution to be "discharges" covered by § 401 is evidenced by the provisions of § 313 (33 U.S.C. § 1323), wherein Congress clearly distinguished between the terms "discharge" and "runoff" from nonpoint sources of pollution.[9] In § 313, Congress directed that federal agencies were to comply with state laws with respect to water pollution control and abatement. In doing so it expressly noted that any activity which may result in *either a discharge or runoff of pollutants* was covered:

> Each department, agency, or instrumentality of the . . . Federal Government (1) having jurisdiction over any property or facility, or (2) which

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[9] Sections 313 and 401 were companion provisions originally adopted as § 21(a) and § 21(b) respectively of the 1970 Water Quality Control Act. At their inception both provisions applied solely to "discharges"; however, in the 1972 amendments Congress modified § 313 by adding the term "runoff."

This revision illustrates that Congress did not consider runoff from nonpoint sources to be included within the term "discharges." If Congress had intended nonpoint sources to be subsumed within the original term "discharge" as argued by petitioners, then there would have been no reason to modify § 313 to add the new provision dealing with "runoff." Likewise, if Congress had intended runoff from nonpoint sources to be included within § 401, it would have added the term "runoff" at the same time it added the term to the companion provisions of § 313 in the 1972 amendments.

> engaged in any activity resulting, or which may result, in the *discharge or runoff of pollutants* . . .

33 U.S.C. § 1323(a) (emphasis added). The inclusion of the term "runoff" in § 313, stands in stark contrast to the companion provisions of § 401 wherein the term "runoff" was omitted.

This omission demonstrated that Congress did not view the term "discharge" as used in § 401 to include runoff from nonpoint sources. The absence of the term "runoff" or other references to nonpoint sources of pollution speaks forcefully as to Congress' intent that "runoff" was not a "discharge" and that certification was not to apply to nonpoint sources of pollution.

To support its contention that discharges includes nonpoint sources, petitioners argue that since § 401 certification has been required of dams, which have at times been considered to be nonpoint sources of pollution, then all nonpoint sources are subject to certification. (ER 10-11). Petitioners' generalization simply ignores that dams can be both nonpoint sources as well as point sources of pollution. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 fn. 22 (D.C. Cir. 1982) (a dam can in some circumstances be a point source and that the EPA has required § 402 permits for the discharge of grease, oil, or trash through the outlet works of a dam). Contrary to petitioners' contention that dams are solely nonpoint sources, the issue of whether a dam is a point source or a

nonpoint source is one that is dependent upon the facts of each case.[10]

Petitioners' contention that the term "discharge" includes runoff from nonpoint sources is clearly in error. The Ninth Circuit properly concluded that Congress intended the term to refer solely to point sources. (Pet. App. 12).

III. THE PANEL'S OPINION DOES NOT CONFLICT WITH THE REASONING AND CONCLUSION IN *PUD NO. 1 OF JEFFERSON COUNTY V. WASHINGTON DEPARTMENT OF ECOLOGY*

The petitioners' contention that the Ninth Circuit's opinion is contrary to the holding of this Court in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) is without merit. In *PUD No. 1* this Court addressed whether the State could incorporate into a § 401 certification limitations on both point sources as well as nonpoint sources of pollution. The Court held that such conditions are permissible *once* the threshold condition, the existence of a discharge, is satisfied.

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[10] The petitioners' reliance on the *Power Authority v. Williams*, 475 NYS 2d 901 (N.Y. App. Div. 1984), is also misplaced. In *Power Authority*, the court did not apply an expansive definition to the term "discharge", rather it simply held that certifications are required for a discharge even if the discharge was not shown to contain a "specific and identifiable pollutant" (*id.* p. 904), a conclusion that is consistent with the Ninth Circuit's holding in this case.

Contrary to petitioners' contention, *PUD No. 1*, did not address whether a discharge was present, nor did it need to since all parties conceded that the construction of the dam would result in discharges from point sources through the release of water through the dam's tailrace and through dredge and fill material entering the waterway.

> There is no dispute that petitioners were required to obtain a certification from the State pursuant to 401. Petitioners concede that, at a minimum the project will result in two possible discharges – the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.

PUD No. 1 of Jefferson County, 114 S.Ct. at 1908.

In *PUD No. 1* the parties never argued nor did the Court address the issue of whether a nonpoint source standing alone must obtain a certification under § 401 before a federal permit may issue. The Ninth Circuit's interpretation of the term discharge is consistent with *PUD NO. 1*. Further, its interpretation is consistent with holdings in other circuits as well. *State of North Carolina v. FERC*, 112 F.3d 1175, 1188-89 (D.C. Cir. 1977); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988).

As the Ninth Circuit properly concluded, the holding in *PUD No. 1* is not in conflict with the determination that the term "discharge" does not include "runoff" from

nonpoint sources of pollution. There is no conflict with prior decisions of this Court.

IV. CONCLUSION

The panel's opinion in this case does not conflict with this Court's holding in *PUD No. 1*. Further, the opinion does not conflict with the specific language or legislative intent of the CWA. The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 20th day of August, 1999.

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